

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Marshall S.,

Claimant,

and

Inland Regional Center,

Service Agency.

OAH No. 2011060422

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on July 10, 2011.

The Inland Regional Center (IRC) was represented by Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs.

Marshall S. (Marshall or claimant) was represented by Stephen S.

The matter was submitted on July 10, 2011.

ISSUE

Is Marshall S. eligible for regional center services under the Lanterman Act as a result of a diagnosis of autism?

FACTUAL FINDINGS

Jurisdictional Matters

1. On June 8, 2011, Marshall filed a Fair Hearing Request in which he appealed from IRC's determination that he was not eligible for regional center services under a diagnosis of autism.

2. On July 10, 2011, the record was opened, jurisdictional documents were presented, documentary evidence was received, sworn testimony was given, closing arguments were given, the record was closed, and the matter was submitted.

Diagnostic Criteria for Autism

3. The DSM-IV-TR sets forth the criteria for the diagnosis of autism. As noted in that text, "Pervasive Developmental Disorders are characterized by severe and pervasive impairment in several areas of development reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests and activities." The group of disorders identified as Pervasive Developmental Disorders are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified. The DSM-IV-TR notes that, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests." An individual must have a DSM-IV-TR diagnosis of "Autistic Disorder" to qualify for regional center services.

The DSM-IV-TR diagnostic criteria for "Autistic Disorder" are:

"A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)

1. qualitative impairment in social interaction, as manifested by at least two of the following:

a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction

b. failure to develop peer relationships appropriate to developmental level

c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest)

d. lack of social or emotional reciprocity

2. qualitative impairments in communication as manifested by at least one of the following:

a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

c. stereotyped and repetitive use of language or idiosyncratic language;

d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;

3. restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

b. apparently inflexible adherence to specific, nonfunctional routines or rituals

c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

d. persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder."

Evidence Presented At Hearing

4. On May 9, 2011, IRC staff psychologist Sara Hibbs, Psy.D., conducted a Psychological Assessment, at the conclusion of which she determined that Marshall was ineligible for regional center services and recommended a referral to the Department of Rehabilitation. In her report Dr. Hibbs noted her diagnostic impression to be Axis I:

Pervasive Developmental Disorder, NOS; Attention Deficit/Hyperactivity Disorder, Inattentive Type (by history). Dr. Hibbs administered the Autism Diagnostic Observation Schedule (ADOS) Module 4, the most comprehensive autism-determining test currently available. Dr. Hibbs observed Marshall's presentation and conduct during testing to be completely at odds with an autistic individual. He did not exhibit the types of repetitive behaviors, perseverations or communication skills that persons with an autistic disorder demonstrate. Although Marshall does have significant executive functioning deficits, he is not autistic.

5. Dr. Hibbs testified consistent with her report. She also explained that while she can appreciate the intensive efforts the family has undertaken to "normalize" Marshall's behaviors, nothing about those efforts would have been able to eradicate those behaviors such that she would find him not to be autistic; that is to say, the family's efforts have not "harmed him" from being eligible for services, he simply is not autistic.

6. Marshall's Individualized Education Program (IEP) demonstrated that he was eligible for services with a primary disability of autism. Marshall's family testified that he graduated high school and passed the California exit exam after receiving much focused assistance and special accommodations. No persuasive evidence was offered to refute that testimony. The IEP indicated that Marshall spent 23.2% of his time outside of a regular classroom setting.

7. Records from Kaiser Permanente documented Marshall's diabetes history and poor compliance, his attention deficit disorder, and at some point the records contained the diagnosis of "autism disorder," but not records demonstrating how that diagnosis was made were introduced.

8. Marshall's father and stepmother testified about the tremendous efforts they have made to assist Marshall and about his repetitive behaviors and deficits. Their testimony was heartfelt and sincere.

9. Marshall testified. He answered questions appropriately, demonstrated a great vocabulary, proper intonation and voice inflection, and established that he had paid careful attention to the testimony offered during the hearing. His testimony completely supported Dr. Hibbs' report and testimony. Further, his testimony refuted some of his parents' assertions made during this hearing. Marshall's parents asserted that he performed as well as he did on Dr. Hibbs assessment only because he has been repeatedly prompted on the appropriate responses to give in social situations. However, during his testimony, Marshall appropriately responded to his stepmother's question about his future which she stated he had never before been asked; which clearly demonstrated that he did not require prompting to answer questions correctly and further established the validity of Dr. Hibbs' conclusions.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Authority

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 states:

“The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.”

4. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

5. California Code of Regulations, title 17, section 54000 provides:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

6. California Code of Regulations, title 17, section 54001 provides:

“(a) ‘Substantial disability’ means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

Appellate Authority

7. The purpose of the Lanterman Act is to provide a “pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.” (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

8. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the regional centers is to “assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” The Department of Developmental Services allocates funds to the centers for operations and the purchasing of services, including funding to purchase community-based

services and supports. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 682-683.)

Evaluation

9. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. None of the documents introduced in this hearing demonstrated that Marshall had a diagnosis of autism. The burden was on claimant to establish his eligibility for regional center services under that diagnosis. Claimant introduced no evidence demonstrating that he was eligible to receive regional center services under an autism diagnosis. A school providing services to a student under an autism disability is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, Title 5 and regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

Claimant also argued that there are Kaiser records establishing a diagnosis of autism that IRC did not review. However, claimant bore the burden of proof in this proceeding and it was incumbent upon him to provide IRC with all documents he believed supported his case; it was not IRC's responsibility to obtain them. Claimant also understandably expressed frustration that IRC referred him to the Department of Rehabilitation which in turn referred him to IRC. However, a referral to a state agency does not establish eligibility; it merely indicates that one should be evaluated by that agency to determine eligibility.

Marshall's family also desired to have another evaluation performed and asked during hearing if they could re-apply for eligibility consideration in the future. IRC is not obligated to perform another evaluation at this juncture as it demonstrated that it had preformed the appropriate testing when making its determination. However, Marshall can undergo another autistic disorder evaluation, at his own expense, with an independent provider and submit those results to IRC for consideration and is encouraged to do so. The evidence also established that social security had performed an evaluation and Marshall could submit that to IRC for consideration. IRC should also make an effort to obtain that report, as well. However, a social security evaluation does not establish IRC eligibility, especially in light of an IRC evaluation demonstrating an individual does not have a Lanterman Act defined developmental disability.

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ORDER

Claimant Marshall A.'s appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports under a diagnosis of autism is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act with a diagnosis of autism.

DATED: August 12, 2011

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.